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CROSS-EXAMINING FILM

JESSICA SILBEY*

In the recent Supreme Court case, *Scott v. Harris*,¹ the Court fell for a trick that has seduced moviegoers for more than a century: it treated film as a depiction of reality. The Court held that a Georgia police officer did not violate a fleeing suspect's Fourth Amendment rights when the officer intentionally caused a car crash, rendering the suspect a quadriplegic.² The Court's decision relied almost entirely on the film of the high-speed police chase taken from a "dash-cam," a video camera mounted on the dashboard of the pursuing police cruiser.³

This is not the first time the Supreme Court has acted as film critic in determining the scope of constitutional protection.⁴ The Justices once routinely viewed obscene films to determine whether they conflicted with contemporary community standards.⁵ This may, however, be the first time that the Supreme Court disregarded all other evidence and declared the film version of the disputed events as the unassailable truth. Indeed, the Supreme Court said that, in light of the contrary stories told by the opposing parties in the lawsuit, the only story to be believed was the one the video told: "We are happy to allow the videotape to speak for itself."⁶ And, for the first time in

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1. 127 S. Ct. 1769 (2007).

2. *Id.* at 1773, 1779.

3. *See id.* at 1775.

4. *See generally* Jessica Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493, 496 (2004) (describing problems and contradictions that occur when judges act as film critics when determining the admissibility and weight of film evidence) [hereinafter *Judges as Film Critics*].

5. *See* Miller v. California, 413 U.S. 15, 18–30 (1973) (discussing the evolution of the standards that the Court employs when reviewing obscenity cases).

6. *Scott*, 127 S. Ct. at 1775 n.5.

history, the Supreme Court linked video evidence to the slip opinion on its website.⁷

In *Scott v. Harris*, the Court fell victim to the widespread and dangerous belief—to the degree of enshrining this belief in our national jurisprudence—that film captures reality. As Justice Breyer stated at oral argument, seemingly flabbergasted by the contrary findings below: “I see with my eyes . . . what happened, what am I supposed to do?”⁸

The Supreme Court is not the first court to fall prey to the persuasive power of film. It is typical for courts and advocates to naïvely treat filmic evidence as a transparent window revealing the whole truth—a presentation of unambiguous reality.⁹ Consider the impetus behind the trends in policing which form the factual basis of the *Scott* case, including the practice of filming crime scenes, police stops, interrogations, and confessions. Police use these video recordings to demonstrate what happened free from any questions of bias or misrepresentation: what was said, whether statements were voluntary, whether the police acted on the basis of probable cause, “who dunnit,” and why.¹⁰ From this perspective, the police cruiser’s dash-cam captured the whole story—the only story—of the car chase and the circumstances surrounding the policeman’s use of force.

However, film is a constructed medium.¹¹ The camera always presents a certain point of view and a frame that includes some images and excludes others. Films are depicted in artificial light and color. From the earliest emergence of film technology, filmmakers and critics recognized that the appearance of reality in films is an illusion based upon conventions of representation, much like the convention of perspective in two-dimensional drawings or the conventions of light and dark in oil paintings.¹² These conventions produce images that resemble and represent reality, but are not reality in fact.

7. See *Scott v. Harris*, No. 05-1631, (U.S. Apr. 30, 2007), available at <http://www.supremecourtus.gov/opinions>.

8. Transcript of Oral Argument at 45, *Scott v. Harris*, 127 S. Ct. 1769 (2007) (No. 05-1631) [hereinafter Transcript of Oral Argument]. Justice Stevens was the lone dissenter in the 8-1 decision, and the only Justice who recognized that the film was not the whole story. *Scott*, 127 S. Ct. at 1781–85 (Stevens, J., dissenting).

9. See *Judges as Film Critics*, *supra* note 4, at 506.

10. See Jessica Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 COLUM. J.L. & ARTS 107, 116 (2005) (observing that film is increasingly being used as a policing tool to monitor police and suspect interactions because it appears to provide an objective and unambiguous representation of past events) [hereinafter *Filmmaking in the Precinct House*].

11. See *infra* Part II.

12. *Id.*

Justice Stevens, the sole dissenter in *Scott v. Harris*, articulated this concept when he faulted the majority for disregarding the lower court's factual findings that were based on *all* the evidence—more evidence than just the dash-cam video.¹³ Indeed, Justice Stevens did what many astute film critics do: he noted that the film's portrayal of the event was only one possible version of what happened.¹⁴ Justice Stevens recognized that a filmic representation of events is monocular, but the chase itself—and the reality of the event that is at the heart of the adjudicatory proceeding—is, by its nature, multi-ocular. Justice Stevens understood that film, no matter its form or genre, cannot convey the whole story and should not replace the search for that story in a court of law. A court must consider the many points of view on the disputed event when deciding whether there is a material dispute of fact sufficient to justify sending a case to a jury, not just the filmic version of the story.¹⁵

How could Mr. Scott have countered the weight of the film and its persuasive power? How can advocates counter and undermine seemingly infallible filmic evidence? Advocates must cross-examine films the way they cross-examine witnesses. And because films are assertive in nature,¹⁶ advocates should treat films in the same way they treat other testimonial evidence: critically and with careful scrutiny. Although the lower court decided *Scott v. Harris* on summary judgment, the kind of examination this article proposes could take place when debating the merits of a motion to strike evidence submitted as part of the record on summary judgment rather than at trial, during cross-examination, or pretrial in the form of motions *in limine*. This article will set forth examination techniques using a piece of filmic evidence from *Patric v. Austin*¹⁷ as an example. Courts and advocates can use this article as a resource for understanding how to critically assess and evaluate filmic evidence.

13. *Scott*, 127 S. Ct. at 1782 (Stevens, J., dissenting).

14. *See id.* *See also Judges as Film Critics*, *supra* note 4, at 570.

15. Among other things, Justice Stevens points to the fact that the film obscures the portion of the car chase that took place on a four-lane highway, not a two-lane highway. This would affect the “dangerousness” element of the legal inquiry. He also explains how the film’s distance from traffic lights makes it difficult to discern the color of the signals, also relevant to dangerousness. He then complains that the court minimizes the significance of the police sirens because the sound recording on the film was low, possibly because of soundproofing in the officer’s vehicle. *Scott*, 127 S. Ct. at 1782 (Stevens, J., dissenting).

16. *Judges as Film Critics*, *supra* note 4, at 500, 508 n.62.

17. *Patric v. Austin*, No. A-05-CA-022-AWA, 2006 WL 5266759, slip op. (W.D. Tex. February 14, 2006) (a case brought under 42 U.S.C. § 1983 against Austin police officers for excessive use of force, among other claims, in which the parties used video from the dash-cam of a police cruiser as evidence at trial).

Part I provides a brief background on film and describes the wide array of films that have been used as evidence.¹⁸ This section debunks the following three myths about film as evidence: (1) film is objective and unbiased;¹⁹ (2) its meaning is unambiguous and obvious;²⁰ and (3) film transforms a viewer into an eyewitness.²¹ Part II discusses the case of *Patric v. Austin*, a civil rights lawsuit against the police where both sides used a video of the arrest as evidence.²² This section describes how both parties used the video evidence to validate their version of the events. Using the *Patric* film, Part II will also: (1) discuss the pros and cons of using film evidence; (2) use examination techniques to demonstrate that every film can tell more than one story and less than the whole story; and (3) employ various examination methods to show that every film suffers from ambiguity.²³ Part III will demonstrate how advocates can adapt traditional cross-examination techniques to the unique challenges of film evidence.²⁴ Finally, the article concludes with a comprehensive set of questions for advocates, judges, or fact-finders to use when considering introducing or accepting film evidence.²⁵

I. FILMIC EVIDENCE AND FILM FORM

A. *Typologies of Filmic Evidence*

Filmic evidence comes in a wide variety of genres. The category of filmic evidence I call *evidence verité* purports to be unmediated and unself-conscious film footage of actual events.²⁶ For example, surveillance film is a common form of *evidence verité*. Surveillance film might be taken by a private investigator, an automated device (e.g., ATM machine or toll booth cameras), or might originate from a mounted camera on a police car, as in *Scott v. Harris*. Surveillance footage is in real time, unedited, and not narrated.

18. See *infra* Part I.

19. *Filmmaking in the Precinct House*, *supra* note 10, at 111, 127; *Judges as Film Critics*, *supra* note 4, at 508.

20. *Filmmaking in the Precinct House*, *supra* note 10, at 111–12; *Judges as Film Critics*, *supra* note 4, at 508–09.

21. *Filmmaking in the Precinct House*, *supra* note 10, at 124–25; *Judges as Film Critics*, *supra* note 4, at 519 & n.115.

22. See *infra* Part II.

23. *Id.*

24. See *infra* Part III.

25. See *infra* Part IV.

26. *Judges as Film Critics*, *supra* note 4, at 507, 515–20.

Another kind of *evidence verité* is after-the-fact crime footage, such as film of an interrogation, a criminal confession, or a crime scene.²⁷ These films are also in real time, but are less serendipitous and more deliberate. The camera records evidence that criminals leave behind or create with their confessions rather than catching them in the act of committing crimes.²⁸ Unlike serendipitous surveillance film, films of crime scenes or interrogations may be narrated, if not throughout the film, then at the beginning and the end.

Beyond *evidence verité*, there are other types of filmic evidence that are more obviously staged and scripted, such as day-in-the-life films and videotaped expert reenactments.²⁹ These kinds of films differ in important ways from *evidence verité*. For example, they are usually rehearsed, produced, and edited in order to control the interpretation of the images on film.³⁰ The production process might use special camera lenses and filters; the editing process also involves cutting and splicing, which produces outtakes. These films are self-conscious performances made with trial in mind, most often after a lawsuit has already been filed.³¹ They are quite clearly advocative and testimonial, and yet these types of films often disarm opponents and undermine the power of cross-examination that is so critical to our adjudicative process.

With fast-paced technological change, the forms of filmic evidence are rapidly expanding. For example, advocates now use images from diagnostic imaging devices as evidence at trial that purport to illustrate, at a desirable level of scientific exactitude, various types of motion or objects inside the body.³² These devices include Magnetic Resonance Imaging (MRI), Functional Magnetic Resonance Imaging (fMRI), Computed Axial Tomography (CAT scans), and

27. See *id.* at 509–15 (analyzing the effects of after-the-fact crime films by using two cases in which after-the-fact footage played a role in obtaining criminal convictions). See also Jessica Silbey, *Criminal Performances: Film, Autobiography and Confession*, 37 N.M. L. REV. 189, 218–40 (2007) (discussing the use of criminal confessions as *evidence verité*) [hereinafter *Criminal Performances*].

28. See *id.* at 194–97 (criticizing the use of filmed confessions as evidence of voluntariness, truthfulness, or as a means of dissuading police from using coercive interrogation tactics).

29. *Judges as Film Critics*, *supra* note 4, at 520–21.

30. *Id.* at 520.

31. *Id.*

32. See, e.g., Neal Feigenson, *Brain Imaging and Courtroom Evidence: On the Admissibility and Persuasiveness of fMRI*, 2 INT'L J.L. IN CONTEXT 233 (2006) (discussing the nature and value of fMRI as evidence of mental states and capabilities and the likelihood of its admissibility in court).

Positron Emission Tomography (PET scans).³³ Similarly, the prevalence of digital film is increasing throughout our culture as more people carry a camera of some kind—whether in a phone, laptop, or daily planner.³⁴ This trend increases the likelihood that filmic evidence will appear in today's courtrooms.³⁵

Applying the rules of evidence to these varied and changing genres of film can be a challenging endeavor. With the emergence of new kinds of evidence, the judicial system must either create new rules of evidence or find new applications for old rules. So far, many courts and advocates are forced into the latter tack, trying to fit these new film forms into old evidence categories. They analogize film to demonstratives, such as chalks or illustrations, or treat film as substantive evidence without conducting sophisticated analyses of the probative value or prejudice inherent in filmic evidence.³⁶ Frequently, courts and advocates muddle the evaluation of film as evidence and reinforce troublesome myths about film and its relationship to reality and truth. These are myths that filmmakers and film historians have

33. See Laura Stephens Khoshbin & Shahram Khoshbin, *Imaging the Mind, Minding the Image: An Historical Introduction to Brain Imaging and the Law*, 33 AM. J.L. & MED. 171, 176–82 (2007).

34. See, Katie Hafner, *Film Drop-Off Sites Fading Fast As Digital Cameras Dominate*, N.Y. TIMES, Oct. 9, 2007, at C1 available at <http://www.nytimes.com/2007/10/09/business/09film.html>. Moreover, serendipitous film footage of citizen encounters with police abounds. A simple search of the website YouTube.com turns up hundreds of police videos. See YouTube.com home page, <http://www.youtube.com>. For example, in *Jones v. City of Cincinnati*, 521 F.3d 555, 561–62 (6th Cir. 2008) the court, on a motion to dismiss, disregarded footage from a police cruiser's dash-cam that captured the arrest of Nathaniel Jones, but the film is on YouTube.com. <http://www.youtube.com/watch?v=o3-MrFOLXFs>. See also Press Release, Suffolk County District Attorney's Office, Investigation into the Death of Victoria Snelgrove (September 12, 2005), available at <http://www.mass.gov/dasuffolk/docs/091205a.html> (noting the use of video footage in an investigation of an incident in which a Boston Red Sox fan died after police shot her with rubber pellets).

35. There is now a field called digital forensics which is devoted to the determination of whether and how digital photographs and films (among other types of digital media) have been altered. See Brian D. Carrier, *Basic Digital Forensic Investigation Concepts* (June 7, 2006), http://www.digital-evidence.org/di_basics.html; see also Claudia Dreifus, *A Conversation With Hany Farid: Proving that Seeing Shouldn't Always be Believing*, N.Y. TIMES, Oct. 2, 2007, at F2, available at <http://www.nytimes.com/2007/10/02/science/02conv.html> (describing the digital forensics field within computer science); Susan Llewelyn Leach, *Seeing is No Longer Believing*, CHRISTIAN SCI. MONITOR, Feb. 2, 2005, at 15, available at <http://www.csmonitor.com/2005/0202/p15s02-lire.html> (discussing the ethical concerns with manipulating photographs).

36. See, e.g., Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1, 65 (1998) (noting that as of the early 1990s, photography "hovered uncomfortably on the boundary between illustration and proof").

long rejected, such as: (1) film's objectivity;³⁷ (2) film's lack of ambiguity;³⁸ and (3) film's witnessing function.³⁹

Filmic evidence may be offered as demonstrative evidence to illustrate verbal testimony⁴⁰ or as substantive evidence that by itself tends to prove or disprove a disputed fact.⁴¹ Demonstrative evidence "is premised upon the theory that it is easier and much more effective simply to show the jurors what is being described, rather than to waste time and to risk possible confusion by relying solely upon oral testimony."⁴² Common examples are diagrams and charts,⁴³ but photographs and films fit the category of demonstrative evidence as well. Substantive filmic evidence—through its representation of events, places, and people—asserts the existence or nonexistence of certain facts.⁴⁴ Film is particularly persuasive in making such assertions because of its apparent indexical relationship to reality.⁴⁵ When we watch film, we trust that it is capturing an event, place, or person as filmed. Indeed, to admit film into evidence, the evidentiary authentication doctrine requires that a witness testify as to whether the film is a fair and accurate portrayal of the thing it purports to represent.⁴⁶

37. See *Filmmaking in the Precinct House*, *supra* note 10, at 111, 127 and *Judges as Film Critics*, *supra* note 4, at 508. In their excellent treatise on evidence, Christopher Mueller and Laird Kirkpatrick call attention to the fact that all photographic evidence creates a risk of prejudice because images may be "unnecessarily gruesome, inflammatory, or otherwise unfairly prejudicial," and caution that modern technology makes it possible to "manipulate, distort, and fabricate all forms of photographic imagery." CHRISTOPHER B. MUELLER AND LAIRD C. KIRKPATRICK, EVIDENCE § 9.14 (3rd ed. 2003). They do not, however, discuss the limitations inherent in the use of film and video as evidence, even where it is not inflammatory and has not been intentionally manipulated to create a distortion.

38. *Filmmaking in the Precinct House*, *supra* note 10, at 111; *Judges as Film Critics*, *supra* note 4, at 508–09.

39. *Filmmaking in the Precinct House*, *supra* note 10, at 124; *Judges as Film Critics*, *supra* note 4, at 519;

40. See BLACK'S LAW DICTIONARY 596 (8th ed. 2004).

41. See FED. R. EVID. 401. See also BLACK'S LAW DICTIONARY 599 (8th ed. 2004) (defining substantive evidence as that which is "offered to help establish a fact in issue").

42. Melvin Belli, *Demonstrative Evidence: Seeing is Believing*, 16 TRIAL 70, 71 (July 1980) (quoting *Judges as Film Critics*, *supra* note 4, at 503).

43. See BLACK'S LAW DICTIONARY 596 (2004) (defining demonstrative evidence as evidence that may include an explanatory aid, such as a chart or a map).

44. See *Judges as Film Critics*, *supra* note 4, at 570 (describing filmic evidence as "assertive and accountable").

45. ANDRÉ BAZIN, WHAT IS CINEMA? 21 (Hugh Gray ed. & trans., University of California Press 2005) (1967) (describing the ontological relationship between film and the thing or event filmed).

46. FED. R. EVID. 901(b)(1).

There is, however, an important distinction between demonstrative evidence and substantive evidence. Demonstrative evidence is not actually admitted into evidence and does not go into the jury room during deliberations.⁴⁷ The trial judge might instruct the jury that demonstrative evidence is merely an aid to understanding the oral testimony connected to the film, but is not itself evidence in the case. Substantive evidence, on the other hand, is formally admitted and is ordinarily available to the jury during deliberations.⁴⁸ If the judge admits the film as substantive evidence, it may be considered with all other evidence as proof of the existence or non-existence of relevant facts.⁴⁹ One may wonder, of course, whether jurors understand or pay any attention to such nuanced instructions distinguishing demonstrative from substantive evidence, especially when a film is the object of the instruction. As a practical matter, regardless of whether a film is shown merely as a demonstrative aid or as substantive evidence, it can be expected to have a powerful impact on jurors.

Treating film as substantive evidence as opposed to a demonstrative aid would recognize film's assertive nature. This would be a step in the right direction because assertive proffers of evidence are routinely tested for their accuracy and bias through cross-examination. However, most courts and advocates appear to believe that what they see on film is perfectly clear (unambiguous as to its meaning)⁵⁰ and unbiased (the film does not lie or present prejudices).⁵¹ These assumptions render any further examination unnecessary. *Scott v. Harris* demonstrates this phenomenon: eight of the nine Supreme Court Justices determined that the police video unambiguously and objectively demonstrated the absence of unreasonable force, despite a variety of substantive evidence to the contrary.⁵² Indeed, the Court stated that the video was the best evidence of the reasonableness of the use of force: the facts of the case were considered "in the light depicted by the videotape,"⁵³ and "summary judgment became

47. Robert D. Brain & Daniel J. Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting Its Proper Evidentiary Status*, 25 U.C. DAVIS L. REV. 959, 960 n.7 (1992) (discussing the historical and theoretical use of demonstrative evidence in law).

48. Nancy Hollander & Barbara Bergman, *Specific Evidentiary Issues*, in EVERYTRIAL CRIMINAL DEFENSE RESOURCE BOOK § 48:1 (2008).

49. See BLACK'S LAW DICTIONARY 599 (8th ed. 2004).

50. *Filmmaking in the Precinct House*, *supra* note 10, at 111; *Judges as Film Critics*, *supra* note 4, at 516.

51. *Filmmaking in the Precinct House*, *supra* note 10, at 111; *Judges as Film Critics*, *supra* note 4, at 508.

52. *Scott v. Harris*, 127 S. Ct. 1769, 1781–82 (2007) (Stevens, J., dissenting) (asserting that the lower court made its decision after examining all substantive evidence).

53. *Id.* at 1776 (majority opinion).

appropriate because a rational jury only could accept the singular, unambiguous version of events presented in the video.”⁵⁴

Film can be so persuasive that some cases and treatises say that film “speaks for itself,” a conclusion with which the Supreme Court now appears to agree.⁵⁵ Commentators call this the “silent witness theory” of photographic or filmic evidence.⁵⁶ The theory that a film operates as a “silent witness” is most prevalent when the evidence comes from an automatic camera, like film from unobtrusive surveillance cameras. In *Scott v. Harris*, the Court treated the film as representing the events so obviously and with such unimpeachable trustworthiness that the film effectively transformed viewers into eyewitnesses. This theory enables judges and fact-finders to feel as if they are seeing the disputed event with their own eyes and, therefore, are free to draw their own conclusions from the film without considering other witnesses or evidence.⁵⁷

B. A Critical History of Film Form

Filmic evidence is not an unambiguous representation of events; by its very nature, film has multiple meanings. So too, film images are not unbiased; rather, they represent one point of view to the exclusion of all others. This means that film viewers are not transformed into eyewitnesses to the event the film represents; instead, the viewer sees only one particular representation of one portion of an

54. *Id.* For an excellent and concise essay on the failings of *Scott v. Harris* and its application of the standard at summary judgment, see Howard Wasserman, *Video Evidence and Summary Judgment: The Procedure of Scott v. Harris*, 91 JUDICATURE 180, 181 (Jan.–Feb. 2008).

55. *Scott*, 127 S. Ct. at 1775 n.5. This has elsewhere been called the “silent witness theory” which dictates that photographic and filmic evidence speaks for itself independent of a sponsoring witness. 3 WIGMORE ON EVIDENCE § 790 n.4 (1970) (noting that as early as 1897, judges have believed that the best evidence is a photograph or other representative evidence). See also *State v. Pulphus*, 465 A.2d 153, 158 (R.I. 1983) (holding that a witness “need not testify that the photograph accurately represents what he observed; the photograph, once properly admitted, ‘speaks for itself’”).

56. See *Judges as Film Critics*, *supra* note 4, at 54. See generally Steven I. Bergel, Comment, “Silent Witness Theory” Adopted to Admit Photographs Without Percipient Witness Testimony, 19 SUFFOLK U. L. REV. 353 (1985) (describing various courts’ applications of the silent witness theory); James McNeal, *Silent Witness Evidence In Relation to the Illustrative Evidence Foundation*, 37 OKLA. L. REV. 219 (1984) (describing the silent witness theory within the context of other categories of evidence).

57. *Judges as Film Critics*, *supra* note 4, at 519. See also Transcript of Oral Argument, *supra* note 8; Claire Duffett, *The Double Edge of Digital Video at Trial*, LAW TECHNOLOGY NEWS, Feb. 28, 2008, <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1204113035617> (quoting a practitioner who states that films “almost make [the jury] a witness to what takes place”).

event. With these limitations in mind, the film's assertive message—the story it tells—must be critically evaluated and tested. Indeed, as the discussion in Part II demonstrates, film's assertive character presents the same types of testimonial risks that traditional hearsay restrictions attempt to minimize: perception, ambiguity and sincerity.⁵⁸ For these reasons, film evidence requires the same cross-examination as a percipient witness to test its truth and accuracy, especially in light of film's powerful persuasive value.

The history of film and filmmaking demonstrates that film is an art form that reconstitutes experience through the play of light and dark, and other mechanisms of filmmaking. This history directly contradicts the perception of film as objective and unambiguous, and substantiates the necessity for critically evaluating this type of evidence.

1. The Illusory Witness

From its beginning, film has been understood as phantasmal and rhetorical. It has an apparent capacity to reveal the world, but this is an illusion; its objective, transparent quality is the source of its persuasive power, or what some call the “myth of total cinema.”⁵⁹

The guiding myth, then, inspiring the invention of cinema, is the accomplishment of that which dominated in a more or less vague fashion all the techniques of the mechanical reproduction of reality in the nineteenth century, from photography to the phonograph, namely an integral realism, a recreation of the world in its own image, an image unburdened by the freedom of interpretation of the artist or the irreversibility of time.⁶⁰

The “myth of total cinema” is that film reproduces reality in front of viewers' eyes.⁶¹ Film makes spectators feel as though they are witnessing the event or object as the event or object existed when filmed. However, film re-presents the event or object as something never before seen.

58. See FED. R. EVID. 801 Advisory Committee's note. (“The factors to be considered in evaluating the testimony of a witness are perception, memory, and narration. Sometimes a fourth is added, sincerity.”)

59. BAZIN, *supra* note 45, at 17.

60. *Id.* at 21.

61. See *id.* at 17.

The first film genre played with the myth that film transforms viewers into witnesses. Named “actualities,” these short films purported to document some lived experience.⁶² This is the genre that spawned documentaries.⁶³ The first of these films that played to a movie theater audience was *L’arrivee d’un train en gare de La Ciotat* (The Arrival of a Train at La Ciotat).⁶⁴ This film did what its title purported to do: it showed a train arriving in the station at La Ciotat. The camera was stationed on the quay such that the train grew larger and larger on screen as it got closer to the station. Upon showing this film at the Grand Café in Paris in 1895, the audience members reportedly screamed and ran from the theater, afraid the train was going to run them down.⁶⁵ Unaccustomed to the illusion of reality in motion that film creates, the audience members feared for their lives and never saw the end of the film.⁶⁶ The filmmakers of *L’arrivee d’un train en gare de La Ciotat* played with the audience’s expectations, expectations which remain part of the movie-going experience today. Film’s mimetic quality of lived experience provides the audience with the pleasure of playing the role of witness to some event that feels live before them but which is, in fact, merely projected on a screen. The audience’s pleasure (both voyeuristic and based on the perceived acquisition of knowledge) persists regardless of whether the event portrayed occurred as the film represents it.⁶⁷

Less than a decade later, Edwin Porter created *The Great Train Robbery*.⁶⁸ This film is credited as the first pseudo-documentary: a documentary on how to rob a train.⁶⁹ With the popularity of this film came the fear and hope, unabated today, that film is powerfully explanatory and can show viewers the truth about an aspect of life of which they have no personal knowledge. Many pseudo-documentaries followed, including Flaherty’s *Nanook of the North*,⁷⁰ Dziga Vertov’s

62. DAVID BORDWELL, *ON THE HISTORY OF FILM STYLE* 13 (Harvard University Press 1997).

63. See BILL NICHOLS, *INTRODUCTION TO DOCUMENTARY* 83 (Indiana University Press 2001).

64. GERALD MAST & BRUCE F. KAWIN, *THE MOVIES: A SHORT HISTORY* 22 (Allyn & Bacon 1996); *L’ARRIVEE D’UN TRAIN EN GARE DE LA CIOTAT* (Lumière 1895).

65. MAST & KAWIN, *supra* note 64.

66. *Id.*

67. See generally LAURA MULVEY, *VISUAL AND OTHER PLEASURES* (Indiana University Press 1989).

68. *THE GREAT TRAIN ROBBERY* (Thomas A. Edison, Inc. 1903).

69. MAST & KAWIN, *supra* note 64, at 42.

70. *NANOOK OF THE NORTH* (Revillon Frères 1922) (documenting the daily life of an Inuit man); see Louis Menand, *Nanook and Me “Fahrenheit 9/11” and the Documentary*

newsreel montages,⁷¹ and Leni Riefenstahl's *Triumph of the Will*.⁷² Some categorize the films of Michael Moore and Errol Morris in this genre as well.⁷³ These pseudo-documentaries demonstrate that all films operate as a form of rhetoric and aim to persuade. All film is fiction. It is shaped, feigned, and created.⁷⁴ Therefore, its relationship to reality must be critically interrogated, especially if the film will be used as evidence upon which a legal judgment will be based.

2. *The Grammar of Film*

Another contribution *The Great Train Robbery* made to film form stemmed from the structure of its editing. Porter taught us that by juxtaposing shots of otherwise discontinuous images, the filmmaker creates logic where none existed before.⁷⁵ This is called *montage*, a principle exemplified by the famous experiments that filmmaker Lev Kuleshov conducted in the 1920s using students from the Moscow Film School.⁷⁶ These experiments demonstrated that the meaning of a single shot changes dramatically depending on the images that frame it.⁷⁷ In the experiments, Kuleshov juxtaposed the same image of a man's face with, alternatively, a bowl of soup, a corpse in a coffin, and a child playing. To the audience viewing the edited film, the actor portrayed a different emotion in each of these scenes.⁷⁸ When the man's face was juxtaposed with the image of the coffin, the audience reported that the man appeared deeply sorrowful.⁷⁹ Yet when the same face was juxtaposed with the image of the soup, the audience reported that the man appeared to be hungry.⁸⁰ When next to the child, the

Tradition, THE NEW YORKER, Aug. 9, 2004, at 90–92 (comparing the origins of documentary film with the contemporary resurgence of the genre).

71. CHELOVEK S KINO-APPARATON [MAN WITH A MOVIE CAMERA] (VUFKU 1929) (documenting the daily lives of citizens in Soviet cities); see also Vlada Petric, *Cinematic Abstraction as a Means of Conveying Ideological Messages in The Man with the Movie Camera in THE RED SCREEN: POLITICS, SOCIETY, ART IN SOVIET CINEMA 90* (Anna Lawton ed., Routledge 1992).

72. TRIUMPH DES WILLENS [TRIUMPH OF THE WILL] (Leni Riefenstahl-Produktion 1935) (documenting the Nazi party's 1934 Congress at Nuremberg).

73. *Filmmaking in the Precinct House*, *supra* note 10, at 109, 111 and accompanying notes.

74. "Fiction" is from the latin *factio*, meaning "a making, counterfeiting," and *ingere*, meaning "to form, mold." WEBSTER'S NEW WORLD COLLEGE DICTIONARY, 502 (3d ed. 1996).

75. BORDWELL, *supra* note 62, at 13.

76. MAST & KAWIN, *supra* note 64, at 176.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

audience perceived the man as joyful.⁸¹ Therefore, the same image can mean different things depending upon its relationship to the shots before and after it: “Editing alone had created the scenes, their emotional content and meaning”⁸² This established one of the most important tenets of film editing: the human tendency to create relationships and imagine connections between otherwise unrelated scenes.⁸³ In other words, audiences perceive a narrative where none existed before.

Other than montage, film creates meaning by manipulating the camera’s perspective (angles) and breadth of view (wide shots and focus). Film director D.W. Griffith, the early American director and initial master of this kind of film language, engineered the close-up, deep focus, long shot, pan shot and traveling shot.⁸⁴

Griffith had learned . . . [that] films were capable of mirroring not only physical activities but mental processes. Films could recreate the activities of the mind: the focusing of attention on one object or another (by means of a close up), the recalling of memories or projecting of imaginings (by means of a flashback or forward), the division of interest (by means of the cross-cut).⁸⁵

By using the camera’s movement to mimic the mind’s eye, Griffith’s techniques are especially effective in blurring the camera’s recreation of some event in the past with the audience’s perception that it is witnessing some event in the present.

3. *Film Bias*

All films have a point of view or voice, whether conscious or mechanical. There is always a filmmaker or a camera operator whose perspective is captured on film while other perspectives are excluded: “The documentarist, like any communicator in any medium, makes endless choices. He . . . selects topics, people, vistas, angles, lens, juxtapositions, sounds, words. Each selection is an expression of his

81. *Id.*

82. *Id.*

83. BORDWELL, *supra* note 62, at 34.

84. *Id.* at 13–14; *see also* MAST & KAWIN, *supra* note 64, at 57–58.

85. MAST & KAWIN, *supra* note 64, at 54.

point of view, whether he is aware of it or not, whether he acknowledges it or not.”⁸⁶

The stakes in shaping that voice are particularly high when the voice is used in documentary films or *evidence vérité*. The inevitability of a bias, a specific perspective that excludes others, provokes significant epistemological uncertainties. For instance, all stories, even true ones, can be told from different angles, with different morals and objectives. Each version may be entirely truthful, but no single version tells the whole story. Another epistemological uncertainty originates from every film’s demand that the film audience assess the authority of the film voice—whether an implicit or explicit narrator—as trustworthy or not.

When filmmakers developed a narrative point of view in films, this mechanism helped popularize the art of film and added to its sense of realism. First person narrative film developed in the 1920s and used the embodiment of a single subject whose thoughts, directions, and desires motivated the film. The first person narrative film form capitalized on the capacity of films to create a sense of intimacy and revelation by blurring the “boundary between subjective and objective perceptions.”⁸⁷ It also perpetuated a sense of singularity and wholeness in the viewing audience, adding to the sense that the audience was seeing the events on screen live. However, early films also made clear that knowing and seeing from that singular perspective was problematic because that perspective wholly relied on the trustworthiness of the storyteller. For example, the 1919 film, *The Cabinet of Doctor Caligari*,⁸⁸ typifies early first-person narrative film. Throughout the film, the audience believes that the main character is telling a tragic but true story. However, as the film progresses, it becomes clear that the character was actually telling the audience a deluded and paranoid fable from inside his suite at a mental institution.⁸⁹

Despite its capacity for distortion, the first-person narrative film style flourished and formed the basis of classic Hollywood film styles because it perpetuated the fantasy of the unique and central

86. STELLA BRUZZI, *NEW DOCUMENTARY: A CRITICAL INTRODUCTION* 4 (quoting ERIK BARNOUW, *DOCUMENTARY: A HISTORY OF THE NON-FICTION FILM* 313 (Oxford University Press 1983) (1974).

87. MAST & KAWIN, *supra* note 64, at 136.

88. *DAS CABINET DES DR. CALIGARI* [THE CABINET OF DR. CALIGARI] (Decla-Bioscop AG 1920).

89. MAST & KAWIN, *supra* note 64, at 138.

subject who legitimates or vouches for the film's meaning.⁹⁰ But from its inception, this genre questioned the falseness of film's omniscience and transparency. This first-person narrative style has become so ubiquitous that its irony is lost on most audiences today. Film makes or designates its audience as centered and all-knowing when it is film itself that constitutes and influences the perspective to which the audience is subject.

4. *Film's Self-Critique*

Another hallmark of early film is its critique of its own mode of representation. Early films drew attention to their constructed nature by either manifesting their filmic qualities or breaking with the illusion and drawing the audience into the creation of the film's story. George Melies' *The Magic Lantern*,⁹¹ made in 1903, is often cited as the first film about a film, telling the history of Western dramatic art by showing first a landscape painting, then a play, and then an image of the newly developed moving pictures.⁹² By placing film in the trajectory of Western representational art, Melies' film explains that film art is no more or less faithful to its subject than painting. This recognition that the film's story is just one representational scheme among others acknowledges the viewer's complicity in the perpetuation of the illusion of film's omniscience. It became a common practice in early films to tell stories about telling stories through pictures.⁹³ Although now a ubiquitous and varied feature of cinema—like in the film *Adaptation*⁹⁴ or Hitchcock's classic *Rear Window*⁹⁵—film's early self-reflexive tendencies were another way of commenting on its illusion of reality and providing a mode of resistance to the —“myth of total cinema.”⁹⁶

This resistance is all but lost when film is offered as evidence in an adjudicative context. Film is not a mechanism for witnessing, despite its prevalence in our surveillance society, which bombards us

90. ROBERT STAM, ROBERT BURGoyNE & SANDY FLITTERMAN-LEWIS, *NEW VOCABULARIES IN FILM SEMIOTICS: STRUCTURALISM, POST-STRUCTURALISM AND BEYOND* 186–87 (Routledge 1992).

91. LA LANTERNE MAGIQUE [THE MAGIC LANTERN] (Georges Méliès 1903).

92. MAST & KAWIN, *supra* note 64, at 31.

93. *Id.*

94. ADAPTATION (Beverly Detroit 2002)

95. REAR WINDOW (Paramount Pictures 1954). *See generally* Robert Stam & Roberta Pearson, *Hitchcock's Rear Window: Reflexivity and the Critique of Voyeurism*, 7 *ENCLITIC* 136–45 (Spring 1983). *See also* ROBERT STAM, *REFLEXIVITY IN FILM AND LITERATURE: FROM DON QUIXOTE TO JEAN-LUC GODARD* (Columbia University Press 1992).

96. BAZIN, *supra* note 45, at 17.